**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE SIDE**
**FAMILY COURT APPEAL NO. 94 OF 2004**
WITH
CIVIL APPLICATION NO. 140 OF 2004

Kamal Pushkar Mehra,
Age about 40 years,
Occupation : Service, Hindu,
Resident of 107, Janak Apartment,
Samarth Ramdas Nagar,
Navghar, Vasai (East),
Dist. Thane. ... Appellant

Vs.

Manju Kamal Mehra,
Aged about 35 years,
Occupation : Service, Hindu,
Resident of C/o. G.K. Chawla,
G-1/23, Vijaynagar, Marol,
Andheri (East),
Mumbai 400 059. ... Respondents

Ms. Bhagyashri P. Jakhade for Appellant.

Mr. P.M. Havnur for Respondents.

ALONG WITH
FAMILY COURT APPEAL NO. 95 OF 2004
WITH
CIVIL APPLICATION NO. 118 OF 2004

Mrs. Manju Kamal Mehra ... Appellant

Vs.

Mr. Kamal Pushkar Mehra ... Respondents

Mr. P.M. Havnur for Appellant.

Ms. Bhagyashri P. Jakhade for Respondent.

CORAM : F.I. REBELLO &
ANOOP V. MOHTA,JJ.
DATED : AUGUST 18, 2004

ORAL JUDGMENT (Per F.I. Rebello,J.):

1. Both the appeals are being disposed of by

a common order as they arise from the same order passed by the Family Court.

2. F.C.A. No. 94 of 2004 is an appeal preferred by the husband against the order dated 30.4.2004 made in the petition No. A 978 of 2002 whereby the learned Family Court has been pleased to grant maintenance in favour of the respondent till respondent restitutes conjugal rights. A few facts may be set out as under :

3. The Petitioner and the respondents were married on 12.7.1994 according to Hindu Vedic rites. Daughter Alisha was born from this wedlock on 24.12.1995. The daughter is in the custody of Respondent No. 1. It was the case of the Petitioner that it was respondent wife who put a proposal to the petitioner husband that as she does not have brother, her father needs company and hence, they should go and stay with her parents at Andheri. Her parents were ready to maintain them and they would treat the Petitioner as their son. The Petitioner husband did not accept the same. In the alternate the Respondent wife suggested that they should live separately from the joint family. This suggestion to some extent was acceptable to

the Petitioner. He told her that it cannot be done immediately since his parents would be hurt. However, ultimately he agreed to live separately and requested his parents for the same. The parents had purchased a one bed room flat at Vasai 7 to 8 years prior to the marriage and they agreed that the Petitioner and Respondent could reside independently in the said flat. It is the case of the Petitioner husband that the respondent prior to the marriage and after the marriage worked as a Computer Operator with M/s. R.G. Stone Hospital. She used to go to her parent's on Saturday evenings and stay on till Sunday. The Petitioner had no objection. In due course of time, she started staying over for more days. The Petitioner then slowly was not getting sufficient company of the Respondent. The Respondent always had an intention that the Petitioner should come and stay with her parents as a Gharjavai which he had refused. Various other incidents are set out to point out that it is the respondent wife who had deserted the petitioner husband. Legal notice was served on the respondent wife to which no reply was received. In the meantime, respondent wife has sent notice dated 5.6.2001 addressed to the petitioner which was replied to. It is the case of the Petitioner

husband that he is ready and willing to maintain the respondent wife and child and sincerely wants the company of the respondents to lead happy married life. He has therefore, filed a suit for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. Based on the pleadings of the parties, including the reply filed by the respondent, various issues were framed. The trial court was please to direct the respondent wife to restore conjugal rights forthwith and thereafter proceeded to direct payment of Rs.2,500/- per month towards maintenance for the respondent and Rs.3,000/- per month towards the maintenance of the minor daughter aggregating to Rs.5,500/- per month from the date of the order till respondent restitutes conjugal rights.

4. Appeal No. 95 of 2004 has been preferred by the wife.

5. From the Judgement in Paragraph 20 it is clear that the first point which was fixed for determination read as under :

"Does the Petitioner proves that the Respondent has without any reasonable excuse withdrawn from his

society."

. In answer the finding given is "Not decided". After so holding the Family Court proceeded to answer Point No. 2 which was :

"Whether the Petitioner is entitled to a decree of restitution of conjugal rights?"

. That has been answered in the affirmative. After so answering the same in the affirmative, the Family Court answered Point No. 3 in favour of the Respondent though the point is wrongly stated as whether the Petitioner is entitled for maintenance from the Petitioner for herself or the child?

6. At the hearing of these appeals, on behalf of the appellant their learned counsel contends that in the petition for restitution of conjugal rights, the trial court had no jurisdiction to award maintenance under Section 25 of the Hindu Marriage Act. Section 25 sets out that any court exercising jurisdiction under this Act or at he time of passing any decree or at any time subsequent thereto, on an application made to it for purpose by either the wife or the husband, as the case may

be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant, as having regard to the respondent's own income and other property, if any, the income and the other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

. Section 25 has been considered by the Apex Court in the case of Chand Dhavan Vs. Jawaharlal Dhavan (193) 3 Supreme Court Cases 406. By considering the scheme of Section 25, the Apex Court was pleased to observe that the Hindu Marriage Act preserved the right of permanent maintenance in favour of the husband or the wife, as the case may be, dependent on the court passing a decree of the kind as envisaged under Sections 9 to 14 of the Act. When by court intervention under the Hindu Marriage Act, affectation or disruption to the marital status has come by, at that juncture, while passing the decree, it has the power to grant permanent alimony or maintenance, if that power is

involved at that time. We are not concerned with the latter part of the observations which is based on the subsequent application. This judgement was cited on behalf of the appellant by the learned counsel to contend that no order can be passed under Section 25. We are afraid we can not subscribe to the reading of the judgement as read on behalf of the counsel for the appellant. the Judgement is clear that if the petition results in the decree envisaged under Section 9 to 14, there is power in the court to award maintenance. The only question perhaps which requires consideration is whether in the case where the court comes to the conclusion at the instance of the Petitioner husband that Respondent wife must resume cohabitation, then whether in such case, maintenance can be ordered under Section 25 of the Hindu Marriage Act. We do not propose to answer that issue at this stage considering the order to be passed.

7. In the appeal filed by the respondent wife, the major grievance is that the learned Family Court while directing resumption of cohabitation of conjugal rights did not answer point No. 1 which was material for consideration though there is some

discussion while answering Issue Nos. 1 and 2. When the Family Court had fixed the point for determination, it was incumbent on the Family Court to answer the said issue. The learned family Court did not decide the first point and proceeded to answer the second point. We are not at all satisfied with the approach of the learned Family Court. Point No. 1 ought to have been answered after considering the evidence on record as it was relevant for deciding the issues in controversy. Once that be the case, the matter will have to be remanded back to the Family Court for reconsideration. The appellant wife has also challenged the judgment of the Family Court in not answering the issue No. 4A i.e. Whether the Respondent is entitled to return of her Stridhan from the Petitioner. That point was framed but has not been decided by the court. Whether under Section 25 such a relief can be granted, the question is left open for consideration by the Family Court. The appellant wife is also aggrieved by the Award of compensation which according to her is less than what she is entitled to. Considering the order to be passed, that can be decided by the Family Court while answering point No. 1.

8. In the light of the above, the following order

. Both the appeals are partly allowed.

. The impugned order dated 30.4.2004 is set aside. The matter is remanded back to the Family Court for decision a fresh. In the event any of the parties want to lead additional evidence, the Family Court to give them liberty but at any rate to dispose of the matter within six months from today.

. By order of 12.12.2002 the learned Family Court had directed payment of Rs.2,000/- each to the wife and minor daughter aggregating to Rs.4,000/- per month. That order will continue pending the hearing and final disposal of the proceedings before the Family Court.

. With above directions, appeals disposed of along with applications. No order as to costs.

(F.I. REBELLO,J.)

(ANOOP V. MOHTA,J.)